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SUPREME COURT, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 72-456

STAR INDUSTRIES, INC.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

J. BRADLEY COLBURN,
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BARNES, RICHARDSON & COLBURN,
Of Counsel.

September 20, 1972.

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OCTOBER TERM 1971

No. .....

STAR INDUSTRIES, INC., *Petitioner,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The petitioner, Star Industries, Inc., prays that a writ of certiorari be issued to review the final judgment of the United States Court of Customs and Patent Appeals, entered in the office of the clerk of that Court on June 22, 1972.

Opinions Below

The United States Customs Court, Third Division, entered a decision and judgment on December 23, 1970 sustaining petitioner's protest holding Presidential Proclamation No. 3564 invalid and void and classifying the involved Spanish brandy under Item 168.20, Tariff Schedules of the United States (TSUS). Its opinion is reproduced as Appendix I, *infra*, p. 1a, and its judgment as Appendix II, *infra*, p. 14a. The opinion is reported in 320 F. Supp. 1018, 65 Cust. Ct. 662, C. D. 4155 (1970).

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The United States Court of Customs and Patent Appeals reversed the judgment of the Customs Court on June 22, 1972. Its opinion is reproduced as Appendix III, *infra*, p. 15a. This opinion is reported in —— F.2d ——, 59 CCPA ——, C.A.D. 1060 (1972).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1256.

Questions Presented

1. Is Article XXVIII (3) of the General Agreement on Tariffs and Trade an "international obligation" within the meaning of Section 252(c) of the Trade Expansion Act of 1962 (19 U.S.C. 1882(c)) in the light of the expressed repeated refusal of the Congress to approve the said General Agreement?

2. Whatever the status of the General Agreement on Tariffs and Trade, can the provisions of Article XXVIII (3) thereof materially alter the plain meaning of Section 252(c), a statute enacted later in time and which, by its own terms, is made subject only to Section 102 of the Trade Expansion Act (19 U.S.C. 1801)?

3. Should the phrase "having due regard for the international obligations of the United States" be interpreted to expand the statutory grant of power to the President to retaliate against unreasonable import restrictions; and is such an interpretation by the Court below in direct conflict with the principle of the decision of this Court in *The Five Per Cent Discount Cases,* 243 U.S. 97, 61 L.ed. 617 (1917)?

4. Does the proclamation violate the due process clause of the Fifth Amendment to the Constitution for the reason that the action proclaimed was not in accordance with, and

exceeded the scope of the notice of hearing and investigation issued pursuant to Section 252(d) of the Trade Expansion Act of 1962?

Statutes and Executive Agreement (GATT) Involved

The statutes involved herein include provisions of the Tariff Schedules of the United States relating to brandy, together with the relevant headnotes of such Schedules, and Sections 251 and 252 of the Trade Expansion Act of 1962. Article I and Article XXVIII(3) of the General Agreement on Tariffs and Trade are also involved. The text of all of the foregoing is set forth in Appendix IV, *infra*, p. 28a.

Statement of the Case

The petitioner, Star Industries, Inc., seeks a writ of certiorari to review the judgment of the Court of Customs and Patent Appeals, which reversed the judgment of the Customs Court, Third Division, and overruled the petitioner's protest against the assessment of increased duties on Spanish brandy under Item 945.16, Tariff Schedules of the United States (TSUS).

Item 945.16 of TSUS was created by Presidential Proclamation 3564 of December 4, 1963 following a presidential fact-finding that the European Economic Community (EEC) maintained unreasonable import restrictions upon poultry from the United States which directly and substantially burdened U. S. commerce; and further, that the products of the EEC received benefits of trade agreement concessions of the United States. Such fact-finding was required by Section 252(c) of the TEA which thereupon authorized the President, to the extent consistent with the general purposes of the TEA in Section 102 and with due

regard for the international obligations of the United States, to, *inter alia*,

> "suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality."[1]

However, the President proclaimed suspension of duty concessions on brandy[2] imported into the United States from all countries or instrumentalities pursuant to paragraph 3 of Article XXVIII of GATT (dealing with concession withdrawals not specifically related to unreasonable restrictions[3]) which was characterized as "requiring any suspension of trade agreement concessions to be made on a most-favored-nation basis".[4]

Spain is not a member of the EEC and was not found to have maintained unreasonable import restrictions on imports from the United States. Accordingly, petitioner contested the validity of Proclamation 3564 in the United States Customs Court. That Court upheld petitioner's claim holding, *inter alia*, that the enabling statute, Section 252(c), does not authorize withdrawal of trade agreement concessions on a most-favored-nation basis; that Section 252 is an exception to the most-favored-nation principle, Section 251; that Section 252(c) is free from ambiguity and the action contemplated thereby is plainly selective in nature; that the President exceeded the power granted him

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[1] Section 256(1) of the TEA defines the EEC as an "instrumentality".

[2] As well as potato starch, dextrine and soluble or chemically treated starches, and automobile trucks.

[3] Article XXIII of GATT relates to nullification or impairment of benefits. It is the only provision of GATT dealing directly with the subject matter to which section 252 of the T.E.A. is related. Both provisions (Section 252 and Article XXIII) contemplate selective retaliatory action.

[4] Proclamation 3564, paragraph 5, Appendix VI, *infra*.

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ig Section 252(c) when suspending to all nations the application of the benefits of certain tariff concessions; and that said Proclamation 3564 is thereby invalid and void.

The Court of Customs and Patent Appeals reversed the judgment of the Customs Court, holding the proclamation to be valid as issued under authority of Section 252(c). In so holding, the Court recognized the "apparent conflict" between the selective language authorizing action under Section 252(c) of the TEA and paragraph 3 of Article XXVIII of GATT which, via the "negotiative" history thereof, it held to be a most-favored-nation provision. However, the Court below proceeded to resolve this conflict by going behind the plain language of Section 252 to reach an interpretation of the statute permitting the President to retaliate on a universal basis under Section 252(c) consistent with Article XXVIII(3). Thus, it held that the President, having found Article XXVIII(3) of GATT to be an international obligation requiring most-favored-nation treatment, he was authorized to act in conformity therewith under Section 252(c). The Court further held that if a different article of GATT had been involved, which was an exception to the most-favored-nation principle of the GATT, then selective action under Section 252 (c) might well be appropriate.

REASONS FOR GRANTING THE WRIT

I.

The case presents important questions as to the status in domestic law of the General Agreement on Tariffs and Trade which have not been, and should be, decided by this Court.

The Reciprocal Trade Agreements Act of 1934 (Section 350 of the Tariff Act of 1930, as amended, 19 U.S.C. 1351) gave to the President the first general authority to nego-

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tiate Executive trade agreements and give them domestic effect by his own act of proclamation, without the necessity of presenting them to the Senate for its advice and consent as treaties. To this authority to negotiate and proclaim was added the *proviso*

> That the President may suspend the application [of duty rates negotiated and proclaimed hereunder] to articles the growth, produce or manufacture of any country because of its discriminatory treatment of American commerce. . . .

Pursuant to the said authority, the President has negotiated and proclaimed many such Executive trade agreements, including the General Agreement on Tariffs and Trade ("GATT") proclaimed effective as of January 1, 1948.

As early as 1922, the United States had adopted the policy of including unconditional most-favored-nation clauses with respect to Customs duties in its various bilateral commercial treaties. The most-favored-nation principle, was also independently embodied in Article I of GATT. But there have always been exceptions in the domestic law of the United States to most-favored-nation treatment.[5] One such exception is clearly the aforementioned authority to retaliate against foreign discrimination contained in the Reciprocal Trade Agreements Act of 1934, *supra*. This conclusion is undeniable in the light of the language of the statute, the practice of the President, logic, common sense, and the legislative history if resort thereto be proper.

The President's authority to negotiate and proclaim trade agreements was carried forward without change material hereto by a series of statutes culminating in the

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[5] Section 251 provides by its own terms certain exceptions to the application of most-favored-nation treatment, 19 U.S.C. § 1881.

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Trade Expansion Act of 1962. That Act also contained the President's authority to retaliate against foreign discrimination in a separate Section 252. The language of that section was expanded to detail three specific situations in which retaliation by suspension of concession rates would be permissible. In addition, a specific condition precedent was added to the effect that retaliatory suspension must be consistent with the general purposes of the Act, and it was provided that, in considering retaliatory suspension, the President must give "due regard to the international obligations of the United States". The substance of the President's power, however, remained unchanged—"to suspend, withdraw or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality".

In 1963, the President issued Proclamation 3564 wherein he found as a fact that the European Economic Community maintained unreasonable import restrictions, and he purported to suspend certain trade agreement concession rates in retaliation. The President determined, however, that he was required by Article XXVIII of GATT to suspend said concessions on a most-favored-nation basis.[4] In its opinion below, the United States Court of Customs and Patent Appeals agreed that the President was empowered to take such action.

Petitioner herein is an importer of certain brandy from Spain who was required to pay increased duties as a result of the suspension of concession rates purported to be effected by Proclamation 3564. Spain is not and was not a member of the European Economic Community and there has been no determination that Spain has engaged in any activities coming within the scope of Section 252 of the Trade Expansion Act such as discrimination against U. S. commerce.

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[4] Presidential Proclamation 3564, Appendix VI, *infra*.

The Court below interpreted the meaning of Article XXVIII of GATT by resort to negotiative history and other means. It determined that there was "an apparent conflict" between the meaning of said Article XXVIII and the plain language of Section 252. It proceeded to go behind the plain meaning of the language of Section 252 to reach an interpretation of that language allegedly consistent with Article XXVIII.

The Court below recognized that the plain meaning of Section 252(c) authorizes selective retaliatory action, as a matter of domestic law, but considered that the President's power to exercise that authority was controlled by the relevant provisions of GATT. The CCPA even suggests that the quantum of power delegated to the President by the Congress may be increased or diminished depending upon which of the various procedures contained in his own Executive Agreement (i.e. the GATT) the President elects to utilize.[7]

Question is thus squarely presented as to the primacy as between a provision of an Executive Agreement (GATT Article XXVIII) entered into pursuant to Congressional delegation of authority, and a subsequent Act of Congress (Section 252, Trade Expansion Act).

Prior decisions of State and Federal Courts have expressly or implicitly dealt with the general issue of the validity of GATT.[8] Petitioner here does not, however, question the basic validity of GATT. Rather, petitioner prays that this Court take jurisdiction of a case involving a direct conflict between a particular portion of GATT (assuming that the CCPA's interpretation thereof is correct) and a subsequent domestic statute. Research reveals

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[7] See Appendix III, p. 27a, *infra*.

[8] Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 Mich. L. Rev. 249, 269 (1967).

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no prior case where this issue has been passed upon by any United States court. Further, it is believed that this Court has never passed upon, cited or mentioned GATT.

If the decision of the Court below is allowed to stand, it is believed that it will constitute clear departure from established foreign relations law and the decisions of this Court under which there can be no doubt that an Executive Agreement must be overriden by an Act of Congress later in time. The error at the core of the decision below is compounded by the fact that the United States statute which the Court found to be controlled by the meaning of the Executive Agreement was a reenactment of the same statute under which that Agreement was made.

At the time of passage of the Trade Expansion Act, Congress was acutely aware of the discriminatory practice being employed by the EEC and others. The GATT was referred to by the Senate Committee sponsor of Section 252(c) as a mere "gentleman's agreement" in no manner binding upon the President or Congress.[9]

Whatever might be true in cases of Executive Agreements generally, the GATT occupies a special place. On the facts presented, one may validly question whether Article XXVIII of GATT constitutes an "international obligation" of which the President must have "due regard" for purposes of Section 252(c).

The United States is a "member" of GATT only by virtue of its signature on the Protocol of Provisional Application, 61 Stat. (Part 6) A2051, 55 U.N.T.S. 308 (1947) under which the United States is bound to apply Article XXVIII only "provisionally". Under paragraph 5 of the Protocol, the United States is free to withdraw upon sixty days notice. Under GATT Article XXVI, the Agreement has not entered into force with respect to *any* government.

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[9] Hearings before the Senate Finance Committee, 87th Congress, 2d Session, on H.R. 11970, pages 170-171; Vol. 108, Congressional Record, page 19811.

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The Congress, in enacting trade legislation, has repeatedly, and explicitly, refrained from approving or disapproving GATT.[10] Legislative history of Section 252 shows that the requirement of "due regard for the international obligations of the United States" was added to assure that the President would not lightly or precipitously act in a manner inconsistent with our most-favored-nation treaties. GATT, however, whatever its place in the hierarchy of Executive Agreements, is patently not a treaty, and even if it were, the President presumably had authority under Section 252 to act inconsistently with it if he found such action appropriate after having due regard for our country's international obligations.

Whatever the status of GATT, the concept of "due regard for the international obligations of the United States" clearly relates to the binding weight of specific obligations in specific contexts. In any event, "due regard" does not mean utter deference.

As a full consideration of relevant data would show, U. S. trade policy and history since the Great Depression have been characterized by the controlled and calculated delegation of Congressional power in that area to the Executive Branch of government. The Executive has argued, doubtless with good reason, that such delegations are practical necessities. By the same token, however, these delegations have uniformly contained clear limitations and have been subjected to intelligible principles of legislative will in view of the ultimate and inalienable responsibility of Congress in these matters.[11]

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[10] See Trade Agreements Extension Act of 1951, Section 10; Trade Agreements Extension Act of 1953, Section 103; Trade Agreements Extension Act of 1954, Section 3; Trade Agreements Extension Act of 1955, Section 3(a)(1)(A); Trade Agreements Extension Act of 1958, Section 10.

[11] Article I, Section 8, Clause 1 and Clause 3, The Constitution of the United States.

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Viewed in broad terms, the decision below has the effect of sweeping away the Constitutionally imposed checks and balances and substituting Executive for Congressional policy-making, and exalting the GATT into the position of a coherent and unified expression of U. S. foreign trade law regardless of, and in this case in spite of, the expressed will of Congress.

It is submitted that the opinion below is erroneous, and if allowed to stand it could have profound and sweeping ramifications extending beyond the facts of this case into the entire area of our international trade.

II.

The phrase "having due regard for the international obligations of the United States" in Section 252, Trade Expansion Act of 1962, cannot expand the express grant of power to the President to take action against unreasonable import restrictions and the lower court's interpretation on this point is clearly erroneous and in direct conflict with the principle of the decision of this Court in *The Five Per Cent Discount Cases*.

The lower court's interpretation of the phrase "having due regard for the international obligations of the United States" appearing in Section 252(c) of the TEA is clearly erroneous and in violation of elementary principles of statutory construction. For purposes of ready reference, Section 252(c) is set forth:

Sec. 252. FOREIGN IMPORT RESTRICTIONS

(a) • • •

(b) • • •

(c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agree-

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ment concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 102, and having due regard for the international obligations of the United States—

(1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of *such country or instrumentality,* or

(2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with *such country or instrumentality.* (Emphasis added.)

By simple and recognized analysis, the primary "condition" of the statute is the maintenance of adverse and unreasonable import restrictions by a foreign country or instrumentality; the "legal subject" of the statute is the President; and the "legal action" of the statute is to, *inter alia,* "suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality". *Sutherland on Statutory Construction,* 3rd Edition, Vol. II, section 4906, pp. 391-392. Additionally, the statute contains (1) a condition precedent that the legal action "may" be taken only to the extent consistent with the purposes of the TEA (section 102) and (2) a general statement of policy that the President have due regard for our international obligations.

The "legal action" of the statute being clearly and separately drafted from the "condition" and "statement of policy", there is no basis for the lower court's interpretation that they affect the scope of the legal action prescribed. It is fundamental that a condition of the statute indicates "when" action is or is not to be taken, not

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what that action is. *A fortiori,* a statement of policy has even less effect on the prescribed scope of the legal action.

Furthermore, if the condition and statement be viewed as a proviso, it is equally clear that their effect, if any, is to restrict the enacting provisions of the law. *Sutherland, supra,* Vol. II, section 4932, pp. 469-471.

Thus, the action authorized by Section 252(c) being plainly selective in scope i.e., retaliation against the offending country or instrumentality, as found by the lower court, it was error for that court to construe the phrase of the statute requiring due regard for international obligations as expanding the authority of the President to take universal retaliatory action under the provision of Section 252(c)(1), *supra.* It must be clear that such language, if at all operative, merely restricted the times when such action could be taken and in no way altered the scope of that action. The President could either act selectively or not act at all.

A closely analogous case is *The Five Per Cent Discount Cases, supra.* In that case the Court of Customs Appeals had held that under Section IV. J, subsection 7 of the Tariff Act of 1913, merchandise imported in registered vessels of the United States or those of all other nations entitled by treaty to pay no higher levy than U. S. vessels was granted a 5 per cent discount on duties. Subsection 7 provided:

> "That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

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In reversing the court below, Justice Holmes, writing for the Court, held that the unambiguous, literal meaning of the law permitted the discount only on United States vessels and that the proviso was meant only as a condition precedent, saying that:

> "There is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation, but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent, in order to universalize a grant that purports to be made to a single class, and to do so notwithstanding the express requirement of the statute that specified rates should be paid."
>
> • • •
>
> "It seems to us obviously more reasonable to suppose that Congress was content to indicate a policy to be pursued when possible than that, by circuitous and inapt language, it enacted that there should be a general discount from the rates specifically directed to be charged."

The principle of interpretation of the decision in the *Five Per Cent Discount Cases* is in direct conflict with the interpretation of the Court of Customs and Patent Appeals in this case in giving an invasive and perverted effect to the statement of policy in the statute that the President have due regard for our international obligations in exercising the specific grant of authority contained in the unambiguous language of Section 252(c)(1).

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III.

Presidential Proclamation 3564 violates the due process clause of the Fifth Amendment to the Constitution for the reason that the action proclaimed was not in accordance with, and exceeded the scope of the notice of hearing and investigation issued pursuant to Section 252(d) of the Trade Expansion Act of 1962.

Section 252(d) requires that the President provide an opportunity for the presentation of views concerning foreign import restrictions which are referred to in subsections (a), (b) and (c) of Section 252 and that, upon request, provide for appropriate public hearings after reasonable notice.

In accordance with this Congressional mandate, a notice of public hearings concerning the proposed increases in duties on brandy and other merchandise was issued on August 7, 1963[12] specifically stating that the purpose of the hearings was to consider increases in rates of duty to redress the imbalance of trade concessions between the United States and the European Economic Community and that the increases would be proclaimed by the President pursuant to Section 252(c) of the Trade Expansion Act of 1962.[13]

There can be no question but that this notice apprised the public of an investigation concerning EEC commodities only. The reference in the notice to Section 252(c) strengthens this conclusion since that section grants the President power to take selective retaliatory action against the offending instrumentality; i.e., the EEC.

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[12] Federal Register, August 7, 1963, page 8066.

[13] See Appendix VII, *infra*. The Notice cited only Section 252 and did not mention Article XXVIII of GATT.

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Hence, Star Industries, Inc. was not notified that its prospective imports of brandy from Spain might become subjected to four times the duties it was then paying. In fact, petitioner was notified that future imports of brandy from France might become subject to increased duties and if it were to avoid such a consequence, it should make a presentation to the Trade Information Committee. It is a reasonable assumption that, based upon the explicit language of the notice, Star concluded that if any duty increases were made on brandy, they would not affect Spanish importations.

The hearings were concluded and recommendations made to the President. Pursuant to the Committee's findings Proclamation 3564 was promulgated. However, in violation of the scope of the public notice, the proclamation was not limited to the articles which were the growth, manufacture or produce of the member countries of the EEC.

Star Industries, Inc. was misled into a false sense of security. As a direct result of the President's improper action, Star was not given its statutory right to be heard. Its interest in the rates of duty on Spanish brandy were adversely affected without due process of law.[14]

The Proclamation is therefore invalid and void since it was not limited to the scope of the public notice.

Furthermore, the decision by the court below ignores and is in conflict with its earlier decision in *Carl Zeiss, Inc.* v. *United States,* 23 CCPA 7, T.D. 47654 (1935) where the court held that the action of the President taken pursuant to the finding of the Tariff Commission was in excess of the scope of the matters contained in the public notice. The notice apprised interested parties of an investigation relating to, *inter alia,* "optical instruments of

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[14] *Wolf* v. *Colorado,* 338 U.S. 25, 27, 93 L.ed. 1782, 1785 (1949).

a class or type *used by* the Army, Navy or Air Force for fire control and parts thereof." The subsequent Tariff Commission report, and the President's action pursuant thereto, related to "optical instruments *suitable to be used by*" said armed services. The court held that reasonable public notice was not given to all interested parties in order that they might, if they so desired, be present, produce evidence, and be heard.

Although fully argued and briefed, neither the *Zeiss* case nor the valid constitutional issue involved was mentioned by the court below.

CONCLUSION

For reasons set forth herein, the writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

September 20, 1972.

APPENDIX I

(C.D. 4155)

STAR INDUSTRIES, INC. *v.* UNITED STATES

United States Customs Court, Third Division

Protest 66/76209-19686-64 against the decision of the collector of customs at the port of New York

[Judgment for plaintiff]

(Decided December 23, 1970)

Barnes, Richardson & Colburn (*J. Bradley Colburn, James F. Donnelly, E. Thomas Honey,* and *Norman C. Schwartz* of counsel) for the plaintiff.

L. Patrick Gray, III, Assistant Attorney General (*Velta A. Melnbrencis,* trial attorney), for the defendant.

Before RICHARDSON, LANDIS, and ROSENSTEIN, Judges

RICHARDSON, Judge: The merchandise of this protest consists of brandy in 4/5 quart bottles valued at over $9.00 per proof gallon which was imported at the port of New York from Spain and withdrawn from warehouse for consumption after January 7, 1964. The brandy was liquidated pursuant to item 945.16 of the Tariff Schedules of the United States at the duty rate of $5.00 per proof gallon which is the statutory rate therefor carried over into the Appendix of the Tariff Schedules from paragraph 802 of the Tariff Act of 1930. And the importer claims in its protest that the brandy is properly dutiable under item 168.20 of the tariff schedules at $1.25 per gallon—the trade agreement rate provided for under rate column 1, and also that the assessment of duties herein is illegal and void.

Item 945.16, which was added to the Appendix to the Tariff Schedules by Presidential Proclamation No. 3564, 98

Treas. Dec. 711 (T.D. 56072) dated December 4, 1963, reads as follows:

APPENDIX TO THE TARIFF SCHEDULES

• • • • • • • •

PART 2. TEMPORARY MODIFICATIONS PROCLAIMED PURSUANT TO TRADE-AGREEMENTS LEGISLATION

• • • • • • • •

Subpart B. Temporary Modifications Pursuant to Section 252 of the Trade Expansion Act of 1962

• • • • • • • •

945.16 Brandy, valued over $9.00 per gallon (provided for in items 168.20 and 168.22) [column 1] ..... $5 per gal.

And item 168.20 of the tariff schedules reads as follows:

TARIFF SCHEDULES OF THE UNITED STATES

• • • • • • • •

SCHEDULE 1.—ANIMAL AND VEGETABLE PRODUCTS

PART 12.—BEVERAGES

• • • • • • • •

Subpart D. Spirits, Spirituous Beverages and Beverage Preparations

• • • • • • • •

Brandy:

168.20 In containers each holding not over 1 gallon [column 1] ..... $1.25 per gal.

And Presidential Proclamation No. 3564 reads as follows:

By The President of the United States of America

A Proclamation

Whereas the European Economic Community maintains unreasonable import restrictions upon imports of poultry from the United States;

Whereas such unreasonable import restrictions directly and substantially burden United States commerce;

Whereas products of the European Economic Community receive benefits of trade agreement concessions made by the United States;

Whereas it is consistent with the purposes expressed in Section 102 of the Trade Expansion Act of 1962 (19 U.S.C. 1801) for the United States to suspend the application of the benefits of certain of those trade agreement concessions;

Whereas, having due regard for the international obligations of the United States, particularly paragraph 3 of Article XXVIII of the General Agreement on Tariffs and Trade* requiring any suspension of trade agreement concessions to be made on a most-favored-nation basis, I am taking steps to suspend, on a most-favored nation basis, certain trade agreement concessions in the United States schedules to that Agreement; and

Whereas rates of duty suspended by this proclamation will not be required or appropriate to carry out any trade agreement on and after January 7, 1964:

Now, Therefore, I, Lyndon B. Johnson, President of the United States of America, acting under the authority vested in me by the Constitution and statutes of the United States of America, including Section 252(c) of the Trade Expansion Act of 1962 (19 U.S.C. 1882(c)) and Section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. 1351 (a)(6)), and in order to suspend the application of the benefits of certain trade agreement concessions, do hereby proclaim (until such time as the President of the United States of America otherwise proclaims)—

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* That agreement of October 30, 1947, has been proclaimed by Proclamation 2761A of December 16, 1947 (61 Stat. (pt. 2) 1103), which proclamation has been supplemnted by subsequent proclamations.

(1) the termination of that part of any prior proclamation which proclaims rates of duty inconsistent with those provided for in the amendment made by paragraph (2) of this proclamation; and

(2) the amendment of the Tariff Schedules of the United States (28 F.R. 8599, as corrected, 28 F.R. 9131) by inserting under the heading "Subpart B" of Part 2 of the Appendix thereto the following:

Item	*Article*	*Rates of Duty* 1	2
•	• • • • •	•	•
945.16	Brandy, valued over $9.00 per gallon (provided for in items 168.20 and and 168.22)	$5 per gal	No change
•	• • • • •	•	•

The rates provided for in the amendment made by paragraph (2) of this proclamation shall be effective as to all articles entered, or withdrawn from warehouse, for consumption on and after January 7, 1964.

In witness whereof, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this fourth day of December in the year of our

Lord nineteen hundred and sixty-three, and of the Independence of the United States of America the [Seal] one hundred and eighty-eighth.

Lyndon B. Johnson

By the President:
Dean Rusk,
Secretary of State

The parties are in agreement concerning the essential facts of this controversy, having entered into a stipulation which is part of the record herein along with the official

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papers. In evidence perforce of the stipulation as exhibit 1 is a true copy of the said Presidential Proclamation No. 3564 hereinbefore set out in pertinent part, and as exhibit 2 a notice of public hearing which preceded the issuance of said proclamation. Among other things, the parties agree that the statutory duty rate on brandy, hereinbefore referred to, was reduced from time to time by various trade agreements proclaimed under the authority of Section 350 of the Tariff Act of 1930, as amended (19 U.S.C.A., Section 1351), and that for the involved brandy the trade agreement rate in effect as of August 30, 1963 was $1.25 per gallon in containers each holding not over one gallon.

No question is raised herein respecting compliance with the procedural requirements preceding the issuance of Presidential Proclamation No. 3564, or as to the constitutionality of the Trade Expansion Act of 1962. Plaintiff contends that Proclamation No. 3564 is illegal and void because it did not comply with the requirements of Section 252(c) of the Trade Expansion Act of 1962 (19 U.S.C.A., Section 1882(c)) and purported to increase the rate of duty on brandy, valued at over $9 per gallon, from all countries, and also purported to terminate that part of any prior proclamation which proclaimed rates of duty inconsistent with those proclaimed in Proclamation No. 3564. Defendant contends that Proclamation No. 3564 is valid because the President had statutory power to terminate a prior proclamation in whole or in part at any time, and because the President's authority under section 1882(c) is not limited to action against an offending country or instrumentality.

Proclamation No. 3564 refers, among other things, to Section 1882(c) and to Section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C.A., Section 1351(a)(6)), in that order, as the specific statutory authority for the action undertaken therein by the President to suspend application of the trade agreement concessions complained about here

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by plaintiff. Section 1882(c) reads:

> (c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 1801 of this title, and having due regard for the international obligations of the United States—
>
> (1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or
>
> (2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

Section 1801 (19 U.S.C.A., Section 1801), referred to in section 1882(c), reads:

> The purposes of this chapter are, through trade agreements affording mutual trade benefits—
>
> (1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce;
>
> (2) to strengthen economic relations with foreign countries through the development of open and non-discriminatory trading in the free world; and
>
> (3) to prevent Communist economic penetration.

And section 1351 (a)(6) reads:

> (6) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

In addition to the foregoing statutes, Proclamation No. 3564 also calls attention in its fifth recital to paragraph 3 of Article XXVIII of the General Agreement on Tariffs and Trade (GATT) as influencing the determination of the President to suspend on a most favored nation basis certain trade agreement concessions in the United States schedules to that agreement. Paragraph 3 of Article XXVIII of GATT as amended by the Geneva Protocol of Amendment (8 UST 1790-1791) reads:

Modification of Schedules

* * * * * * *

3. (a) If agreement [to modify or withdraw concessions by negotiation] between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the

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day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

The Protocol of Amendment to GATT was signed without reservation as to Part III of GATT (which includes Article XXVIII) by all of the countries now constituting the European Economic Community (EEC),* among others, as well as by the United States. And apparently, in view of language appearing in the Notice of Public Hearing which is before us as exhibit 2, the President had in mind the utilization of the provisions of paragraph 3 of Article XXVIII of GATT to redress the imbalance of tariff concessions between the United States and the EEC arising out of the withdrawal of a German tariff concession on poultry and the subsequent imposition by the EEC of *unreasonable import restrictions* upon United States exports of frozen poultry.

The court may not, of course, review the factual determinations made by the President in connection with the issuance of Proclamation No. 3564. *United States* v. *George S. Bush & Co., Inc.*, 310 U.S. 371 (1940). However, the court can and should, where the legality of a Presidential proclamation is questioned, determine whether the proclamation accords with the laws and international obligations governing and affecting its issuance, and render judgment thereupon accordingly. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933); *George E. Bardwil & Sons* v. *United States*, 42 CCPA 118, C.A.D. 583 (1955).

As we read paragraph 3 of Article XXVIII of GATT it does not *require* suspension of trade agreement concessions on a most favored nation basis. In fact, favored nation

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* France, Italy, the Netherlands, Belgium, Luxembourg, and the Federal Republic of Germany.

treatment is not even mentioned or implied in paragraph 3. Under paragraph 3 a country having a principal supplying interest or a substantial interest is permitted to withdraw *substantially equivalent consessions initially negotiated with the applicant contracting party.* We construe this language merely to authorize reciprocal action on the part of contracting parties to GATT with respect to modification of tariff concessions, following a break down in negotiations and unilateral withdrawal of concessions by a contracting party.

Neither does Section 252 of the Trade Expansion Act of 1962 (19 U.S.C.A., Section 1882) authorize the withdrawal of trade agreement tariff consessions on a most favored nation basis, in our opinion. Section 251 of the Trade Expansion Act of 1962 (19 U.S.C.A., Section 1881) provides:

> Except as otherwise provided in this title, in section 350(b) of the Tariff Act of 1930, or in section 401(a) of the Tariff Classification Act of 1962, any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this title or section 350 of the Tariff Act of 1930 shall apply to products of all foreign countries, whether imported directly or indirectly.

Thus, section 1881, which must be read together with section 1882, expressly carves out an exception to the most favored nation principle in favor of section 1882 proceedings, among other things, of which section 1882(c) is one of the proceedings excepted.

We find the language of section 1882(c) to be clear and free from ambiguity. Section 1882(c) authorizes the President, among other things, to suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of a country or instrumentality maintaining unreasonable import restrictions which substantially burden United States commerce. The action contemplated by this statute is plainly selective in nature. As applied to the

facts of this case section 1882(c) authorizes the President to suspend, withdraw or prevent the application of benefits of tariff concessions to products of the EEC countries in view of the factual findings made in Proclamation No. 3564. Section 1882(c) would not, however, authorize such action to be taken by the President against the products of Spain, the country of origin of the involved merchandise, or against the products of any other country not constituting a part of the EEC bloc. And since the action taken in Proclamation No. 3564 extends to all countries *vis-a-vis* the most favored nation principle, support for such action, if it exists, must be found under section 1351(a)(6).

A number of cases have been called to our attention on the subject of the power of the President to terminate a proclamation. See *Barclay & Company, Inc.* v. *United States,* 47 CCPA 133, C.A.D. 745 (1960); *United States* v. *American Bitumuls & Asphalt Co. et al.,* 44 CCPA 199, C.A.D. 661 (1957), cert. den. 355 U.S. 883 (1967); *George E. Bardwil & Sons* v. *United States,* 42 CCPA 118, C.A.D. 583 (1955); *United States* v. *Metropolitan Petroleum Corp., et al.,* 42 CCPA 38, C.A.D. 567 (1954), cert. den. 348 U.S. 858 (1964); and *Alfred Baer* v. *United States* 8 Cust. Ct. 104, C.D. 585 (1942). While these cases are instructive on the subject of the termination power of the President and generally affirm his power to terminate a proclamation in whole or in part at any time, we do not deem it necessary here to review them since they antedate the enactment of the Tariff Classification Act of 1962 which regulates the effect of the exercise of such power, and also do not involve the use of the termination power in conjunction with other authority—the posture of the instant case. General Headnote and Rule of Interpretation No. 4 of the Tariff Schedules of the United States states:

> 4. Modification or Amendment of Rates of Duty. Except as otherwise provided in the Appendix to the Tariff Schedules—
>
> * * * * * * *

(d) whenever a proclaimed rate is terminated or suspended, the rate shall revert, unless otherwise provided, to the next intervening proclaimed rate previously superseded but not terminated or, if none, to the statutory rate.

There is no question but that if the President had elected here to terminate, pursuant to section 1351(a)(6), all of the proclaimed rates on brandy outstanding and intervening between the statutory rate and the GATT rate, inclusive of the GATT rate, he could have done so without ceremony and the ensuing proclamation would have been self-executing in accordance with General Headnote 4(d). However, the President did not elect to exercise the termination power reposed in section 1351(a)(6) in such an abstract manner.

In this case the President undertook to effect a modification of rates of duty on brandy by way of the addition of rates on this product to subpart B of Part 2 of the Appendix to the Tariff Schedules. Part 2B of the Appendix is reserved for temporary rate modifications proclaimed pursuant to section 1882 proceedings, having been added as such to the Appendix with statutory effect by the Tariff Commission in its Fourth Supplemental Report on the Tariff Classification Study in the interim between the enactment of the Tariff Classification Act of 1962 and the publication of the tariff schedules, all as provided for in Section 101 of the Tariff Classification Act of 1962. See *Tariff Classification Study—Fourth Supplemental Report,* page 14. And the rationale of the Tariff Commission for this action is (p. 2, Fourth Sup. Rept.):

Explanation: Since section 350(a)(5) of the Tariff Act of 1930, as amended, has been repealed by section 257(b) of the Trade Expansion Act of 1962 (P.L. 87—794; 76 Stat. 882), headnote 3(d)(ii) has been deleted. The type of action previously provided for in section

> 350(a)(5) has been provided for with considerably greater detail in section 252 of the Trade Expansion Act (76 Stat. 879 and 880). Since the types and scope of action authorized by section 252 are more varied than those authorized by section 350(a)(5), it is considered preferable to provide for any section 252 actions in a new subpart of part 2 (temporary modifications proclaimed pursuant to trade-agreements legislation) of the appendix to the tariff schedules rather than in a general headnote. . . .

Also, Appendix Headnote 1 reads in relevant part:

> 1. The provisions of this Appendix relate . . . to executive . . . actions pursuant to duly constituted authority, under which—
>
> (a) one or more of the provisions in schedules 1 through 8 are temporarily . . . modified . . .

Thus, the utilization of the termination power of section 1351(a)(6) in conjunction with or as an aid to section 1882 proceedings, which is the use employed at bar, proceeds in derogation to the use of the termination power alone as provided for in General Headnote 4(d).

In this case Proclamation No. 3564 proclaims:

> (1) the termination of that part of any prior proclamation which proclaims rates of duty inconsistent with those provided for in the amendment made by paragraph (2) of this proclamation . . .

and paragraph (2) of that proclamation sets forth the schedule of rates for brandy and other products which are being added to Part 2B of the Appendix. Since this schedule of duty rates is predicated upon a section 1882(c) action taken by the President to temporarily modify duty rates under the tariff schedules, we are of the opinion that the provisions of section 1882(c) are regulatory of any use by the President of the termination power of section 1351

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(a)(6) in such undertaking. As such, any limitations written into section 1882(c) affecting the scope of Presidential action taken under that statute would be determinative of the scope of the termination power of section 1351(a)(6) exercised in conjunction with the section 1882(c) action or in aid thereof.

As we have concluded herein that upon the basis of the instant facts the President, proceeding under section 1882 (c), could only suspend, withdraw, or prevent the application of trade agreement concessions as to EEC countries, we find that the termination power of section 1351(a)(6) could only be utilized here by the President to achieve that result, i.e., the termination of any prior proclamations to the extent that they proclaim rates of duty for products of EEC countries inconsistent with those provided for in the schedule of duty rates set forth in paragraph (2) of the proclamation. However, in Proclamation No. 3564 the President proclaimed that the duty rates provided for in the paragraph (2) schedule were effective as to *all* articles entered, or withdrawn from warehouse, for consumption on and after January 7, 1964. In so doing, he exceeded the authority granted to him in the enabling statute, namely, section 1882(c), and as the result, Proclamation No. 3564 is invalid and void, and we so hold.

The rates of duty for brandy contained in rate column 1 of item 168.20 of the tariff schedules being unaffected by Proclamation No. 3564 by reason of our holding herein, it follows that plaintiff's claim for classification of the involved Spanish brandy thereunder is well founded, and the protest is sustained.

Judgment will be entered herein accordingly.

RICHARDSON
J.

Concurring:
LANDIS
J.
ROSENSTEIN
J.

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APPENDIX II

Judgment

UNITED STATES CUSTOMS COURT

THIRD DIVISION

STAR INDUSTRIES, INC., *Plaintiff*, *vs.* UNITED STATES, *Defendant*.	Suit No. 66/76209-19686-64

This case having been duly submitted for decision to the Third Division of the United States Customs Court, and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED: that the protest claims herein that the merchandise (brandy) is properly dutiable at the rate of $1.25 per gallon under item 168.20 of the tariff schedules and that the assessment of duties herein is illegal and void are sustained.

The regional commissioner of customs is hereby directed to reliquidate the involved entry and make refund of duties accordingly.

SCOVEL RICHARDSON
FREDERICK LANDIS
SAMUEL M. ROSENSTEIN
Judges of the United States Customs Court.

Dated at New York 14, N. Y., this the 23 day of December, 1970.

APPENDIX III

The United States v. Star Industries, Inc.

No. 5454, C.A.D. 1060

United States Court of Customs and Patent Appeals, June 22, 1972

Appeal from United States Customs Court, C.D. 4155 [Reversed] 59 CCPA

L. Patrick Gray, III, Assistant Attorney General, *Alan S. Rosenthal, William D. Appler* for the United States.

Barnes, Richardson & Colburn, attorneys of record, for appellee. *J. Bradley Colburn, James F. Donnelly, Irving Levine*, of counsel.

[Oral argument January 5, 1972 by Mr. Appler and Mr. Colburn]

Before Rich, Almond, Baldwin, Lane, *Associate Judges*, and Re, *Judge*, United States Customs Court, sitting by designation.

June 22, 1972

BALDWIN, Judge.

This appeal is from the decision and judgment of the United States Customs Court, Third Division,[1] sustaining a protest by Star Industries against the amount of duty assessed on brandy imported from Spain. The brandy had been classified under item 945.16, TSUS. The Customs Court ruled that it should have been classified under item

[1] 65 Cust. Ct. 662, 320 F.Supp. 1018, C.D. 4155 (1970).

168.20, TSUS. The pertinent parts of the Tariff Schedules read as follows:

Schedule 1.—Animal and Vegetable Products
Part 12.—Beverages

* * *

Subpart D. Spirits, Spirituous Beverages and Beverage Preparations

* * *

Brandy:

168.20 In containers each holding not over 1 gallon * * * ..... $1.25 per gal.

* * *

Appendix to the Tariff Schedules

* * *

Part 2. Temporary Modifications Proclaimed Pursuant to Trade-Agreements Legislation

* * *

Subpart B. Temporary Modifications Pursuant to Section 252 of the Trade Expansion Act of 1962

* * *

945.16 Brandy, valued over $9.00 per gallon (provided for in items 168.20 and 168.22) * * * .... $5 per gal.

At issue in this case is the validity of Presidential Proclamation No. 3564,[7] which brought item 945.16 into existence. That proclamation reads in pertinent part as follows:

By The President of the United States of America
A Proclamation

Whereas the European Economic Community maintains unreasonable import restrictions upon imports of poultry from the United States;

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[7] 77 Stat. 1035 (1963).

Whereas such unreasonable import restrictions directly and substantially burden United States commerce;

Whereas products of the European Economic Community receive benefits of trade agreement concessions made by the United States;

Whereas it is consistent with the purposes expressed in Section 102 of the Trade Expansion Act of 1962 (19 U.S.C. 1801) for the United States to suspend the application of the benefits of certain of those trade agreement concessions;

Whereas, having due regard for the international obligations of the United States, particularly paragraph 3 of Article XXVIII of the General Agreement on Tariffs and Trade * * * requiring any suspension of trade agreement concessions to be made on a most-favored-nation basis, I am taking steps to suspend, on a most-favored-nation basis, certain trade agreement concessions in the United States schedules to that Agreement; and

Whereas rates of duty suspended by this proclamation will not be required or appropriate to carry out any trade agreement on and after January 7, 1964:

Now, Therefore, I, Lyndon B. Johnson, President of the United States of America, acting under the authority vested in me by the Constitution and statutes of the United States of America, including Section 252(c) of the Trade Expansion Act of 1962 (19 U.S.C. 1882(c)) and Section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. 1351(a)(6)), and in order to suspend the application of the benefits of certain trade agreement concessions, do hereby proclaim (until such time as the President of the United States of America otherwise proclaims)—

(1) the termination of that part of any prior proclamation which proclaims rates of duty inconsistent with those provided for in the amendment made by paragraph (2) of this proclamation; and

(2) the amendment of the Tariff Schedules of the United States (28 F.R. 8599, as corrected, 28 F.R. 9131) by inserting under the heading "Subpart B" of Part 2 of the Appendix thereto the following:

• • • •

945.16	Brandy, valued over $9.00 per gallon (provided for in items 168.20 and 168.22) • • •	$5 per gal.

The events surrounding Proclamation No. 3564 are referred to in international trade circles as "the chicken war."[3] Briefly, it appears that during the late fifties and early sixties United States poultry producers had found a rapidly burgeoning market for frozen poultry in Germany. In 1962, however, the German import fees on poultry were replaced by import fees promulgated by the European Economic Community (EEC). The EEC import fees were about three times as high as the German fees they replaced,[4] which adversely affected further importation of U.S. poultry into Germany. The action taken by the President in issuing Proclamation No. 3564 was in the nature of the compensatory withdrawal of previously proclaimed tariff concessions. The higher rates were calculated to increase the duty on EEC goods in an amount which would approximately balance the higher EEC import fees.[5]

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[3] For a discussion of the history of the proclamation, see Walker, *Dispute Settlement: The Chicken War*, 58 Am. J. Int'l L. 671 (1964) [hereinafter Walker].

[4] Walker, *supra*, 58 Am. J. Int'l L. at 671.

[5] Walker, *supra*, 58 Am. J. Int'l L. at 673-85; J. Jackson, *World Trade and the Law of GATT*, 174-75, 325-26 (1969) [hereinafter Jackson]; Comment, *Retaliation in International Trade: The Scope of Executive Discretion in Its Choice of Weapons*, 4 Law & Pol. Int'l Bus. 156, 159 (1972) [hereinafter Comment].

Although Spain is not a member of the EEC, the brandy at bar was charged the item 945.16 rate because that rate was instituted on a most-favored nation basis. The products included under Proclamation No. 3564 were apparently chosen to be those imported almost exclusively from the member nations of the EEC.[6]

The statutes specifically relied on for authority in Proclamation No. 3564 read as follows:

> Trade Expansion Act of 1962, Section 252(c) (19 USC 1882(c)):
>
> (c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 1801 of this title, and having due regard for the international obligations of the United States—
>
> (1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or
>
> (2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.
>
> Tariff Act of 1930, Section 350(a)(6) (19 USC 1351 (a)(6)):

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[6] See 28 Fed. Reg. 8066 (1963). In addition to brandy, the rates of duty on potato starch, dextrine and modified starches, and trucks valued at $1,000 or more were increased by Proclamation No. 3564. According to Walker, *supra*, the overall effect of the proclamation on countries which are not members of the EEC has been minor. 58 Am. J. Int'l L. at 681.

(6) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Article XXVIII, paragraph 3 of the General Agreement on Tariffs and Trade (GATT),[7] stated in the proclamation to require suspension of concessions to be on a most-favored-nation basis, reads as follows:

Article XXVIII

Modification of Schedules

• • •

3. (a) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later

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[7] October 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700.

than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

The Customs Court held that the President was not authorized to suspend trade agreement concessions on a most-favored-nation basis under 19 USC 1882(c). In its view, only selective action against the instrumentality which maintains unreasonable import restrictions is authorized by that section. The court did not consider that the proclamation could be upheld on the basis of "due regard for the international obligations of the United States," for in its opinion most-favored-nation treatment was not required by Article XXVIII(3) of the GATT. The court rejected appellant's argument that the proclamation was authorized under the termination power of section 1351(a)(6), holding that:

> [A]ny limitations written into section 1882(c) affecting the scope of Presidential action taken under that statute would be determinative of the scope of the termination power of section 1351(a)(6) exercised in conjunction with the section 1882(c) action or in aid thereof.

Having thus determined that the President had exceeded his authority in issuing Proclamation No. 3564, the court held the proclamation invalid and void.

In addition to matters discussed below, appellant takes issue with the Customs Court's holding with respect to section 1351(a)(6). However, with the view we take of the case, it is unnecessary to reach that issue.

Opinion

With regard to the reliance stated in Proclamation No. 3564 on Article XXVIII(3) of the GATT, the Customs Court stated:

> As we read paragraph 3 of Article XXVIII of GATT it does not *require* suspension of trade agreement concessions on a most favored nation basis. In fact, favored nation treatment is not even mentioned or implied in paragraph 3. Under paragraph 3 a country having a principal supplying interest or a substantial interest is permitted to withdraw *substantially equivalent concessions initially negotiated with the applicant contracting party.* We construe this language merely to authorize reciprocal action on the part of contracting parties to GATT with respect to modification of tariff concessions, following a breakdown in negotiations and unilateral withdrawal of concessions by a contracting party.

The last two sentences of the above quote, though correct, are not pertinent to the question of whether unilateral withdrawal of concessions under Article XXVIII(3) must be made on a most-favored-nation basis. We are therefore left with the court's observation that that Article does not specifically mention most-favored-nation treatment, and its conclusions that such treatment is not implied or otherwise required by that Article.

Appellant contends that Article XXVIII(3) must be read within the context of the entire agreement and points to Article I of the GATT, which provides in pertinent part:

> Article I
>
> General Most-Favoured-Nation Treatment
>
> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation * * *, any advantage, favour, privilege

> or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Appellant also argues that:

> The very nature of Article XXVIII requires that actions taken under it be on a most favored nation basis. Such concessions cannot be withdrawn only as to a particular party. If withdrawn, the result is that they are also withdrawn as to all parties, *i.e.*, those who obtained the concessions on a most favored nation basis. [Footnote omitted.] Any arrangement whereby the particular concessions are continued as to all such other parties, but not the parties with which they were originally negotiated, is clearly not contemplated by Article XXVIII. In this case, Spanish brandy benefited from the original concession made to France, a member of the EEC, and there is little reason to continue the concession once it has been terminated as to the original contracting party.

Turning to the language of Article XXVIII(3), adverse effects on a plurality of countries from a unilateral withdrawal of concessions were clearly contemplated in this provision. A compensating mechanism is therein provided for three classes of countries which would be adversely effected by a unilateral withdrawal of a concession on a particular commodity, *i.e.*, the country with which the concession was originally negotiated, a country having a principal supplying interest in the commodity, and a country having a substantial interest in the commodity.[8] Ar-

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[8] See GATT, Annex I, Notes and Supplementary Provisions, Notes 5-7 to Article XXVIII(1).

ticle XXVIII(3) is therefore at least not inconsistent with the most-favored-nation principle.[9]

Reading Article XXVIII(3) in context with the rest of the GATT, it is clear that conformity with the most-favored-nation principle is required under that Article. One of the primary purposes of the GATT, recited in its preamble, was "the elimination of discriminatory treatment in international commerce." To this end, the most-favored-nation principle was embodied in Article I, quoted *supra*, and in numerous other GATT Articles. The principle has been described as the heart of the GATT.[10] The GATT does contain some exceptions to the principle, but they are few in number and, when they do appear in the instrument, they are clearly spelled out.[11] There is nothing in Article XXVIII(3) which would indicate that that Article was intended to be an exception to the principle.

Moreover, the "negotiative" history of the Article clearly establishes that the negotiators intended to have the most-favored-nation principle govern actions under it.[12] One of the major changes made in the early drafting of the Article was the substitution of the phrase "withdraw the concession" for the phrase "suspend the application to the trade of the contracting party taking such action of substantially equivalent concessions," the intent being to change the effect of the Article from a discrimina-

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[9] An argument can be made that most-favored-nation treatment is implied in the language of Article XXVIII(3). *Cf.* Comment, *supra*, 4 Law & Pol. Int'l Bus. at 164-65; Walker, *supra*, 58 Am. J. Int'l L. at 681-82).

[10] W. Bishop, *International Law*, 158 (2d ed. 1962). See generally Jackson, *supra*, at 249-73; GATT Secretariat, *The Most-favoured-nation Clause in GATT*, 4 J. World Trade L. 791 (1970).

[11] See GATT Secretariat, *supra*, 4 J. World Trade L. at 795-801; Jackson, *supra*, at 270-72.

[12] See *18th Meeting of the Tariff Agreement Committee*, U.N. Doc. EPCT/TAC/PV. 18 (1947). This is one of a series of documents which have been called the "Primary Source for Drafting of GATT." Jackson, *supra*, at 904.

tory action to a nondiscriminatory one.[13] Thus should there be any doubt that nondiscriminatory (most-favored-nation) action was required by Article XXVIII(3), the negotiative history of the Article would settle that doubt. *Nielsen* v. *Johnson*, 279 US 47, 52 (1929) and cases cited; W. Bishop, *International Law*, 171-72 (2d ed. 1962).

The question remains whether 19 USC 1882(c) allows the President to take other than selective or discriminatory action, even when he determines that nondiscriminatory action is required by our international obligations. The Customs Court referred to 19 USC 1881, which provides:

> § 1881. Most-favored-nation principle.
>
> Except as otherwise provided in this subchapter, in section 1351 of this title, or in section 401(a) of the Tariff Classification Act of 1962, any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this subchapter or section 1351 of this title shall apply to products of all foreign countries, whether imported directly or indirectly.

The court considered that section 1881, when read together with the language in section 1882(c) specifying action to be taken with respect to "products of such country or instrumentality" or "a trade agreement with such country or instrumentality," created an exception to the most-favored-nation principle in 1882(c) proceedings. Thus the court did not specifically rule on the provisions of section 1882(c) which limit the action the President may take "to the extent that such action is consistent with the purposes of section 1801 of this title and having due regard for the international obligations of the United States * * *."

---

[13] *Id.* The latter phrase or its equivalent has been retained in sections of the GATT which do provide exceptions to the most-favored-nation principle. See, *e.g.*, GATT Articles XVIII(21), XIX(3) (a) and XXIII(2).

The purposes referred to are listed in 19 USC 1801 as follows:

> (1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce;
>
> (2) to strengthen economic relations with foreign countries through the development of open and *nondiscriminatory* trading in the free world; and
>
> (3) to prevent Communist economic penetration [Emphasis added.]

Thus the use of section 1882(c) on a nondiscriminatory or most-favored-nation basis would not be inconsistent with the purposes referred to in that section.

With regard to the apparent conflict between our international obligations under the GATT and the statements in section 1882(c) that action is to be taken against the country or instrumentality which maintains the unreasonable import restrictions, we find the following excerpt from the legislative history of the section most enlightening:

> Subsections (a) and (b) of section 252 of the bill together authorize action against burdensome foreign import restrictions. They do not, however, authorize action against foreign import restrictions which, though they may be legally justifiable, impose a substantial burden upon U.S. commerce. The amendment provides that whenever a country which has received benefits under a trade agreement with the United States maintains unreasonable import restrictions which burden U.S. commerce either directly or indirectly, the President may withdraw existing trade agreement benefits or refrain from proclaiming any negotiated trade agreement concessions on such products. Under this subsection the President may act only to the extent consistent with the purposes of the act and in exercising this authority he must take into consideration the

> international obligations of the United States. Thus, the amendment would not authorize any indiscriminate breach of international obligations of the United States such as *our most favored nation treaties* with regard to the products of other countries.[14] [Emphasis added.]

The amendment referred to is the Senate amendment to H.R. 11970 which added subsection (c) to section 252 of the Trade Expansion Act of 1962 (19 USC 1882).

Appellee relies on other legislative history which indicates an intent to provide the President with strong measures to combat foreign trade discrimination. We are of the opinion that the interpretation of section 1882(c) embodied in Proclamation No. 3564 fully complies with that intent. Under that interpretation, section 1882(c) provides for the denial of most-favored-nation treatment where the President decides upon that course "having due regard for the international obligations of the United States."[15] The proclamation indicates in the present case that the President did not choose that course because it would have been inconsistent with our international obligations. However, the measures taken under the proclamation were sharply focused on the instrumentality which was maintaining the unreasonable import restrictions—the EEC. Thus the legislative intent to take strong measures against those who maintain unreasonable import restrictions was upheld, and at the same time we did not breach our international obligations.

For the above reasons, we find that the President did not exceed the authority granted him under section 252(c) of the Trade Expansion Act of 1962 (19 USC 1882(c)) in issuing Proclamation No. 3564. That proclamation is therefore valid and the judgment of the Customs Court is *reversed.*

REVERSED

---

[14] S. Rep. No. 2059, 87th Cong. 2d Sess. 2-3 (1962).

[15] Such denial might be appropriate, for example, in cases arising under one of the GATT Articles which allows an exception to the most-favored-nation principle, such as Article XXIII. Cf. Comment, *supra,* 4 Law & Pol. Int'l Bus. at 165-66.

APPENDIX IV

Involved Statutes and Executive Agreement (GATT)

Item 168.20, Tariff Schedules of the United States:

Brandy:		
168.20	In containers each holding not over 1 gallon	$1.25 per gal.

Relevant provisions of the Appendix to the Tariff Schedules of the United States:

APPENDIX TO THE TARIFF SCHEDULES

Appendix Headnotes:

1. The provisions of this Appendix relate to legislation and to executive and administrative actions pursuant to duly constituted authority, under which—

(a) one or more of the provisions in schedules 1 through 8 are temporarily amended or modified, or

(b) additional duties or other import restrictions are imposed by, or pursuant to, collateral legislation.

2. Unless the context requires otherwise, the general headnotes and rules of interpretation and the respective schedule, part, and subpart headnotes in schedules 1 through 8 apply to the provisions of this Appendix.

PART 2.—TEMPORARY MODIFICATIONS PROCLAIMED PURSUANT TO TRADE-AGREEMENTS LEGISLATION

Part 2 headnote:

1. This part contains the temporary modifications of the provisions in the tariff schedules proclaimed by the President pursuant to trade-agreements legislation. Unless otherwise stated, the modified provisions are effective until suspended or terminated.

* * * * * *

Subpart B.—Temporary Modifications Pursuant to Section 252 of the Trade Expansion Act of 1962

* * * * * *

945.16 Brandy, valued over $9.00 per gallon (provided for in items 168.20 and 168.22) ..... $5.00 per gal.

Sections 251 and 252, Trade Expansion Act of 1962 (Public Law 87-794, October 11, 1962, Title II, 76 Stat. 879, 19 U.S.C.A. sections 1881, 1882):

Sec. 251. Most-Favored Nation Principle.

Except as otherwise provided in this title, in section 350(b) of the Tariff Act of 1930, or in section 401(b) of the Tariff Classification Act of 1962, any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this title or section 350 of the Tariff Act of 1930, shall apply to products of all foreign countries, whether imported directly or indirectly.

Sec. 252. Foreign Import Restrictions.

(a) * * *

(b) * * *

(c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 102, and having due regard for the international obligations of the United States—

(1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions *to products of such country or instrumentality*, or

(2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality. (Emphasis added.)

(d) The President shall provide an opportunity for the presentation of views concerning foreign import restrictions which are referred to in subsections (a), (b), and (c) and are maintained against United States commerce. Upon request by any interested person, the President shall, through the organization established pursuant to section 242(a), provide for appropriate public hearings with respect to such restrictions after reasonable notice and provide for the issuance of regulations concerning the conduct of such hearings.

General Agreement on Tariffs and Trade

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article XXVIII

Modification of Schedules

• • •

3. (a) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

APPENDIX V

UNITED STATES CUSTOMS COURT
THIRD DIVISION

STAR INDUSTRIES, INC., *Plaintiff*, -v- THE UNITED STATES, *Defendant*.	Protest 66/76209-9686 on Alcoholic Beverages Entry WH 54183

BEFORE: HON. SCOVEL RICHARDSON, Presiding Judge
HON. FREDERICK LANDIS, Judge
HON. SAMUEL M. ROSENSTEIN, Judge

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, subject to the approval of the Court, as follows:

1. That the merchandise covered by the above-entitled protest consists of certain brandy, the product of Spain, in containers holding less than one gallon each valued at over $9.00 per gallon.

2. That the said brandy was exported from Spain, and was withdrawn from warehouse for consumption after the effective date (January 7, 1964) of Presidential Proclamation No. 3564, dated December 4, 1963 (T.D. 56072); that said brandy was classified under Item 945.16 of the Tariff Schedules of the United States as added by said Proclamation, and was assessed for duty upon liquidation at $5.00 per gallon under said Item 945.16; that a true copy of said Proclamtion No. 3564 is attached hereto and may be received in evidence as plaintiff's exhibit 1.

3. That said Proclamation No. 3564 was issued subsequent to public hearings held before the Trade Information

Committee in the Office of the Special Representative for Trade Negotiations; that notice of the said public hearing was published in the Federal Register of Augsut 7, 1963 at page 8066; that a true copy of the said notice of hearing is attached hereto and may be received in evidence as plaintiff's exhibit 2.

4. That under Paragraph 802 of the Tariff Act of 1930, as originally enacted, brandy was subject to duty at $5.00 per gallon; that by various trade agreements proclaimed under the authority of Section 350 of the Tariff Act of 1930, as amended, the said rate on brandy was reduced from time to time; that the trade-agreement rates in existence on brandy as of August 30, 1963 were $1.25 per gallon on brandy in containers each holding not over one gallon and $1.00 per gallon in containers each holding over one gallon.

5. That the said reduced rates of $1.25 per gallon for brandy in containers each holding not over one gallon, and $1.00 per gallon for brandy in containers each holding over one gallon, were carried forward in Items 168.20 and 168.22, respectively, of the Tariff Schedules of the United States, as proclaimed by the President in Proclamation No. 3548, of August 21, 1963 (Part II, F.R. of Aug. 17, 1963, 28 F.R. 8599, as corrected by F.R. of Aug. 20, 1963, 28 F.R. 9131.), pursuant to the Tariff Classification Act of 1962 (Public Law 87-456, 76 Stat. 72), as amended.

6. That plaintiff claims that said Proclamation No. 3564 is illegal, invalid, null and void and that the involved brandy is properly subject to customs duty at $1.25 per gallon under Item 168.20 of the Tariff Schedules of the United States as in existence prior to the issuance of said Proclamation No. 3564.

7. That plaintiff claims that said Proclamation No. 3564 is illegal, invalid, null and void because, among other reasons, it did not comply with the requirements of Section 252(c) of the said Trade Expansion Act of 1962 and pur-

ported to increase the rate of duty on brandy, valued at over $9 per gallon, from all countries; and further that said Proclamation purports to terminate that part of any prior Proclamation which proclaimed rates of duty inconsistent with those proclaimed in said Proclamation No. 3564.

8. Plaintiff does not raise any issue in respect to the compliance with the procedural requirements of Section 252(d) of said act in providing an opportunity for the presentation of views concerning foreign import restrictions referred to in Section 252(c) and plaintiff does not raise any issue in respect to the constitutionality of the Trade Expansion Act of 1962.

9. That this protest may be submitted for decision upon this stipulation and the exhibits attached hereto; that plaintiff may have 60 days from the date of notice of submission within which to file its brief; that defendant may have 60 days thereafter within which to file its brief.

BARNES, RICHARDSON & COLBURN
Attorneys for Plaintiff
By: E. Thomas Honey
E. THOMAS HONEY

EDWIN L. WEISL, JR.
Assistant Attorney General

By: Andrew P. Vance
ANDREW P. VANCE
Chief, Customs Section

SO ORDERED:

/s/ Samuel M. Rosenstein
SAMUEL M. ROSENSTEIN,
Judge.
Dated: New York, New York
Oct 24, 1968.

Filed
Oct 21 9:43 AM 1968
U.S. Customs Court
New York, N.Y.
Howard Basler, Clerk

APPENDIX VI

(Presidential Proclamation 3564; Plaintiff's Exhibit 1 Below)

IMMEDIATE RELEASE DECEMBER 4, 1963

OFFICE OF THE WHITE HOUSE
PRESS SECRETARY

THE WHITE HOUSE

PROCLAMATION INCREASING RATES OF DUTY ON SPECIFIED ARTICLES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the European Economic Community maintains unreasonable import restrictions upon imports of poultry from the United States;

WHEREAS such unreasonable import restrictions directly and substantially burden United States commerce;

WHEREAS products of the European Economic Community receive benefits of trade agreement concessions made by the United States;

WHEREAS it is consistent with the purposes expressed in Section 102 of the Trade Expansion Act of 1962 (19 U.S.C. 1801) for the United States to suspend the application of the benefits of certain of those trade agreement concessions;

WHEREAS, having due regard for the international obligations of the United States, particularly paragraph 3 of Article XXVIII of the General Agreement on Tariffs and Trade* requiring any suspension of trade agreement concessions to be made on a most-favored-nation basis, I am taking steps to suspend, on a most-favored-nation basis,

---

* That agreement of October 30, 1947, has been proclaimed by Proclamation 2761A of December 16, 1947 (61 Stat. (pt. 2) 1103), which proclamation has been supplemented by subsequent proclamations.

certain trade agreement concessions in the United States schedules to that Agreement; and

WHEREAS rates of duty suspended by this proclamation will not be required or appropriate to carry out any trade agreement on and after January 7, 1964:

NOW, THEREFORE, I, LYNDON B. JOHNSON, President of the United States of America, acting under the authority vested in me by the Constitution and statutes of the United States of America, including Section 252(c) of the Trade Expansion Act of 1962 (19 U.S.C. 1882(c)) and Section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. 1351(a)(6)), and in order to suspend the application of the benefits of certain trade agreement concessions, do hereby proclaim (until such time as the President of the United States of America otherwise proclaims)—

(1) the termination of that part of any prior proclamation which proclaims rates of duty inconsistent with those provided for in the amendment made by paragraph (2) of this proclamation; and

(2) the amendment of the Tariff Schedules of the United States (28 F.R. 8599, as corrected, 28 F.R. 9131) by inserting under the heading "Subpart B" of Part 2 of the Appendix thereto the following:

Item	Article	Rates of Duty	
		1	2
945.13	Potato starch (provided for in item 132.50)	2.5¢ per lb.	No change
945.16	Brandy, valued over $9.00 per gallon (provided for in items 168.20 and 168.22)	$5 per gal.	No change
945.49	Dextrine and soluble or chemically treated starches (provided for in item 493.30)	3¢ per lb.	No change
945.69	Automobile trucks valued at $1,000 or more (provided for in item 692.05)	25% ad val.	No change

The rates provided for in the amendment made by paragraph (2) of this proclamation shall be effective as to all articles entered, or withdrawn from warehouse, for consumption on and after January 7, 1964.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this fourth day of December in the year of our Lord nineteen hundred and sixty-three, and of the Independence of the United States of America the one hundred and eighty-eighth.

(SEAL)

LYNDON B. JOHNSON

By the President:
DEAN RUSK
Secretary of State

APPENDIX VII

(Notice of Public Hearing concerning Proposed Increases in Rates of duty of August 6, 1963; Plaintiff's Exhibit 2 Below)

OFFICE OF THE SPECIAL REPRESENTATIVE
FOR TRADE NEGOTIATIONS

TRADE INFORMATION COMMITTEE
(Docket No. 63-1)

Notice of Public Hearing Concerning Proposed Increases in Rates of Duty on Certain Articles

1. Notice of public hearing.

Pursuant to its regulations and in particular ¶ 211.2(d) of Title 48 of the Code of Federal Regulations (28 F.R. 7947), the Trade Information Committee in the Office of the Special Representative for Trade Negotiations has ordered a public hearing with respect to proposed increases in rates of duty on articles to be selected from those listed in Annex A appended to this notice.

2. Subject matter of public hearing.

The purpose of the public hearing will be to receive information and views concerning the economic effects of an increase in the rate of duty on any article identified in Annex A.

The purpose of such increases in rates of duty would be to redress the imbalance of tariff concessions between the United States and the European Economic Community arising out of the withdrawal of a German tariff concession on poultry, which has been followed by the imposition by the European Economic Community of unreasonable import restrictions upon United States exports of frozen poultry. Such increases in rates of duty as are finally decided upon would be proclaimed by the President pursuant to section 252(c) of the Trade Expansion Act of 1962.

3. Time and place of public hearing.

The public hearing will be held beginning at 10:00 A.M., e.d.s.t. on Wednesday, September 4, 1963, in the Hearing Room of the Tariff Commission, 8th and E Streets, N.W., Washington, D.C. (3d Floor, F. Street side).

4. Presentation of oral testimony.

A request to present oral testimony shall be submitted in writing to the Executive Secretary of the Committee on or before Wednesday, August 21, 1963, and in accordance with the applicable provisions of this notice and the Committee's regulations (Part 211 of Title 48 of the Code of Federal Regulations (28 F.R. 7947)).

Any such request shall include the name, address, telephone number, and organization of the party submitting the request, a brief statement of the party's interest in the subject matter of the public hearing, a brief statement of the position to be taken, and the name of the person who will present oral testimony.

Each party submitting a request will be notified whether the request is granted, and if so, the date on which he is scheduled to appear and the amount of time allotted for his testimony, and, if not, the reasons for the denial.

5. Submission of written briefs.

In order to ensure due consideration, written briefs shall be submitted as early as possible, and in no case later than Tuesday, September 3, 1963. Written briefs shall be prepared and submitted in accordance with the applicable provisions of this notice and the Committee's regulations (Part 211 of Title 48 of the Code of Federal Regulations (28 F.R. 7947)).

6. Limitation on presentation of views.

Oral testimony and written briefs shall be limited to a consideration of the probable economic effects of an increase in a rate of duty on any article identified in Annex A of this notice. Consideration will not be given to oral testimony or written briefs dealing with any article not identified in Annex A.

All communications regarding this notice should be addressed to the Executive Secretary, Trade Information Committee, Executive Office Building, Washington, D. C., 20506.

BERNARD NORWOOD
Chairman

August 6, 1963

ANNEX A

Tariff Schedule of the United States (new) Item No.	Articles	United States Tariff Schedules (existing) Par. No.
117.45.-50	Roquefort cheese	710
125.30	Bulbs, roots, rootstocks, clumps, corms, tubers, and herbaceous perennials: Other imported for horticultural purposes	753
132.50	Potator starch	83
167.30	Still wines produced from grapes, containing not over 14 percent of alcohol by volume, in containers each holding not over 1 gallon	804
168.20-.22	Brandy	802
252.35) 254.25) 256.10)	Cigarette paper, whether or not cut to size or shape, cigarette books, and cigarette bookcovers	1552
310.01-.02	Singles yarns, wholly of continuous man-made fibers (multifilament yarns), with twist but not over 20 turns per inch	1301
437.02	Caffeine	15
437.18	Theobromine	15
455.16-.20	Edible gelatin	41
455.22-.24	Photographic gelatin	41
455.40	Inedible gelatin and animal glue, valued under 40 cents per pound	41
493.30	Dextrine and soluble or chemically treated starches	84
609.22	Flat wire, of iron or steel other than alloy iron or steel, not coated or plated with metal, over 0.05 inch in thickness	316(a)

Tariff Schedule of the United States (new) Item No.	Articles	United States Tariff Schedules (existing) Par. No.
642.74	Cloth, gauze, fabric, screen, netting, and fencing, all the foregoing, of stainless steel, whether in rolls, in endless bands, or in lengths, but not cut to shape, if woven (of simple wrap and weft construction), with meshes finer than 90 wires to the lineal inch in warp or filling	318
650.91	Scissors and shears, and blades therefor, all the foregoing valued over $1.75 per dozen	357
683.50	Shavers and scissors, with self-contained electric motors, and parts thereof	353
692.05	Automobile trucks valued at $1,000 or more, and motor buses	369
723.10	Motion-picture film, 1 inch or more in width, sensitized but not exposed	1551
723.15	Photographic film other than motion-picture film, sensitized but not exposed	1551
723.30	Silver halide photographic papers, senitized but not exposed	1405

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-456

STAR INDUSTRIES, INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 15a–27a) is reported at 462 F. 2d 557. The opinion of the Customs Court (Pet. App. 1a–13a) is reported at 320 F. Supp. 1018.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on June 22, 1972. The petition for a writ of certiorari was filed on September 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTIONS PRESENTED

The President reduced the tariff on brandy to all nations including Spain (which is not a member of the European Economic Community). The question presented is whether the President, upon cancelling the reduction because of the Community's tariff increases on imports from the United States, acted within his authority in applying the cancellation to brandy from countries not members of the Community.

STATUTES AND AGREEMENT INVOLVED

The Trade Expansion Act of 1962, Public Law 87-794, 76 Stat. 872, codified as 19 U.S.C. 1801 *et seq.*:

> SEC. 102 [19 U.S.C. 1801]. *Statement of purposes*
>
> The purposes of this chapter are, through trade agreements affording mutual trade benefits—
>
> (1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce;
>
> (2) to strengthen economic relations with foreign countries through the development of open and nondiscriminatory trading in the free world; and
>
> (3) to prevent Communist economic penetration.
>
> * * * * *
>
> SEC. 251 [19 U.S.C. 1881]. *Most-favored-nation principle*
>
> Except as otherwise provided in this subchapter, in section 1351 of this title, or in section 401(a) of the Tariff Classification Act of 1962,

any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this subchapter or section 1351 of this title shall apply to products of all foreign countries, whether imported directly or indirectly.

SEC. 252 [19 U.S.C. 1882] *Foreign import restrictions*

(a) * * *

(b) * * *

(c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 1801 of this title, and having due regard for the international obligations of the United States—

(1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or

(2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

SEC. 255 [19 U.S.C. 1885] *Termination or withdrawal of trade agreements; termination of proclamations*

(a) * * *

(b) The President may at any time terminate, in whole or in part, any proclamation made under this subchapter.

Section 350(a)(6) of the Tariff Act of 1930, as amended, renumbered by Section 3(a)(7) of the Trade Agreements Extension Act of 1958, codified as 19 U.S.C. 1351(a)(6):

> The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Presidential Proclamation No. 3564, 77 Stat. 1035, is reproduced at Pet. App. 35a–37a. The General Agreement on Tariffs and Trade, 61 Stat. A3, T.I.A.S. No. 1700 provides in pertinent part:

> Article I
>
> General Most-Favoured-Nation Treatment
>
> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation * * *, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

STATEMENT

1. Petitioner is an importer of Spanish brandy, who brought this action in the Customs Court challenging the legality of Presidential Proclamation 3564, 77 Stat. 1035 (1963), which suspended certain presidentially-granted trade concessions and thereby returned the duty on brandy and certain other products to a previous higher level (Pet. App. 15a–16a).

More specifically, the statutory duty of $5.00 per gallon on brandy was originally contained in Paragraph

802 of the Tariff Act of 1930 (Pet. App. 33a). In 1947, the rate was reduced to $1.25 per gallon under a tariff concession granted to France, a member of the European Economic Community ("EEC"). Pursuant to the General Agreement on Tariffs and Trade, however, the reduction was made on a most-favored-nation basis and thus was also applied to Spanish brandy, although Spain is not a member of the EEC (Pet. App. 19a).[1]

In 1963, following an increase in the EEC's tariff on frozen poultry, the President issued proclamation 3564, withdrawing the reduction in the tariff on brandy (among other commodities). Under the most-favored-nation principle, the withdrawal of the reduction was not limited to EEC members, but covered all countries to which the reduced tariff had applied, including Spain (Pet. App. 18a).

The President expressly relied upon two separate and independent grants of legislative authority (Pet. App. 36a):

(1) Section 252(c) of the Trade Expansion Act of 1962, 19 U.S.C. 1882(c), which permits the President to "suspend, withdraw, or prevent the application of trade agreement concessions to products" of a

[1] "Most-favored nation" refers to the policy of according like tariff treatment to like products regardless of their country of origin. Thus, when the United States accorded a reduced tariff on brandy, under an agreement with France, Spanish brandy received the same reduction even though Spain had not negotiated the reduction. Similarly, when the United States raised its tariff on French goods, under the most-favored-nation principle it was required to raise its tariffs on similar goods produced by other countries so that France remains a nation as favored as any other.

country or instrumentality which maintains unreasonable import restrictions burdening United States Commerce, where such action is consistent with 19 U.S.C. 1801 and has "due regard for the international obligations of the United States;" and

(2) Section 350(a)(6) of the Tariff Act of 1930, as amended, 19 U.S.C. 1351(a)(6), which authorizes the President to "terminate, in whole or in part, any proclamation made pursuant to this section."[2]

The Proclamation recited that the President was acting with "due regard for the international obligations of the United States particularly paragraph 3 of Article XXVIII of the General Agreement on Tariffs and Trade requiring any suspension of trade agreement concessions to be made on a most-favored-nation basis" (Pet. App. 35a).

2. The Customs Court held the proclamation invalid. It ruled that Section 252(c) permitted only selective action by the President, and that while Section 350(a)(6) could have supported the termination of all previous reductions, it interpreted the presidential proclamation as increasing existing tariffs rather than withdrawing prior concessions. The Customs Court found this controlling although, if interpreted as an increase, the increase was to the exact level the tariffs would have had if all presidential reductions had been revoked (Pet. App. 9a–13a). The Customs Court, discussing only Section 252(c) ruled that there was no "international obligation of the United States" to be

[2] The statutory rate on brandy had been reduced by trade agreements proclaimed under the authority of Section 350 (Pet. App. 33a).

taken into account under that section (see Pet. App. 25a).[3]

The Court of Customs and Patent Appeals reversed and sustained the proclamation under Section 252(c).[4] After concluding that most-favored nation treatment was contemplated by GATT Article XXVIII:3 (Pet. App. 22a–25a), the court ruled that Section 252(c) allows the President to take action on the most favored nation basis when he determines that such action is required by our international obligations (Pet. App. 25a). It held that such action would be consistent with the purposes of the Act, set forth in 19 U.S.C. 1801, to stimulate this country's economic growth, enlarge foreign markets and develop "open and non-discriminatory trading in the free world" (App. 26a) and would further the Congressional intent of Section 252 "to provide the President with strong measures to combat foreign trade discrimination" (App. 27a).

ARGUMENT

The decision of the Court of Customs and Patent Appeals is correct, and is not in conflict with any decision of this Court, or other federal court. Further review is unwarranted.

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[3] The Customs Court reasoned that the GATT Article cited by the President as the international obligation involved "does not *require* suspension of trade agreement concessions on a most favored nation basis" (emphasis in original) (Pet. App. 8a). The Court of Customs and Patent Appeals rejected this interpretation of the GATT (Pet. App. 22a–25a), and petitioner apparently does not challenge the court's decision on that point. See Petition at 8.

[4] In light of its disposition of the case, the court found it unnecessary to reach the issue involving Section 350(a)(6).

A. *The proclamation is valid under Section 252(c).*

1. The Court of Customs and Patent Appeals held that the President, in cancelling under Section 252(c) tariff reductions given to countries which imposed unreasonable import restrictions against American products, may apply the cancellation to countries which themselves have not imposed restrictions upon imports from the United States, where he concludes that such application would further this country's international obligations and the purposes of the Act. This construction accords with the purpose of Section 252(c). The congressional intent was to enable the President to "take all appropriate and feasible steps within his power" to eliminate all foreign import restrictions which unduly burden the United States' commerce, and to "enlarge the authority of the President" for this purpose. H. Rep. No. 1818, 87th Cong., 2d Sess. 21 (1962); S. Rep. No. 2059, 87th Cong., 2d Sess. 2 (1962).[5]

The language of Section 252(c), while authorizing the President to act against a single country where appropriate, nowhere indicates that only such action is permitted. Indeed, Congress required that the President's action must be consistent with the Act's purposes (see 19 U.S.C. 1801) and have due regard for this country's international obligations. When, as the President concluded in the present case (Pet. App. 35a), both of these considerations required raising the

[5] See, *e.g.*, Representative Smith's statement that Section 252(c) provides "additional authority" to the President, 108 Cong. Rec. 19871 (1962), and Senator Jackson's admonition that "We must give the President full power," 108 Cong. Rec. 19875 (1962).

duty to all countries and not just to those which had raised their duties on American products, the statute permits him to do so.

Nowhere in the extensive legislative history of the Trade Expansion Act is there the slightest hint that Congress intended that the President should be prevented from taking action under Section 252(c) against all countries where necessary to carry out this country's most-favored-nation tariff policy. To the contrary, the Senate Committee Report at least suggests that most-favored-nation actions are the norm, since it points out that "import restrictions imposed under section * * * 252 of title II *need not apply* to products of all countries." (Emphasis supplied). S. Rep. No. 2059, *supra*, at 16.

Moreover, Section 252(c) specifically requires that the President's action have "due regard for the international obligations of the United States." The Senate Report explained (*id.* at 2-3) that:

> the amendment would not authorize any indiscriminate breach of international obligations of the United States *such as our most favored nation treaties* with regard to the products of other countries. [Emphasis supplied.]

2. Petitioner, now apparently conceding the principal issue before the court below, *i.e.* whether GATT Article XXVIII:3 on withdrawal from agreements, when read with GATT Article I (see p. 4 *infra*) requires that withdrawal of concessions be on a most-favored nation basis (see Pet. at 8), contends primarily that GATT is not the type of "international

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obligation" of which the President must take due regard under Section 232(c) (Pet. 9-14).* The terms and legislative history of Section 232(c) refute this position.

Section 232(c) does not limit the President to considering only this country's formal treaties; rather Congress required that action taken under that section have due regard for all "the international obligations of the United States." While the GATT is not a treaty in the Constitutional sense, since the Senate has not ratified it, it is an international obligation. This Court has frequently held that such reciprocal executive agreements are internationally binding. See *B. Altman & Co.* v. *United States*, 224 U.S. 583; *United States*

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* Petitioner also argues that the case presents a conflict between an executive agreement, the GATT, and a subsequent statute, which it asks this Court to resolve by determining "the status in domestic law" of the GATT (Pet. 5-9). Petitioner asserts that the court below held that Section 232(c) "was controlled by the relevant provisions of GATT" (Pet. at 8). Petitioner misconstrues the decision below. The Court of Customs and Patent Appeals did not hold that the most-favored-nation principle embodied in GATT renders Section 232(c) nugatory; rather it held that the President may increase the tariff against all countries where he believes such action is necessary to carry out the purposes of the Act and is consistent with our international obligations. The court did not hold, as petitioner suggests, that the President must always so act or that GATT controls in any conflict with Section 232(c). For as petitioner admits, "the President presumably had authority under Section 232 to act inconsistently with it [GATT] if he found such action appropriate after having due regard for our country's international obligations" (Pet. 10).

v. *Belmont*, 301 U.S. 324; *United States* v. *Pink*, 315 U.S. 203.[7]

Moreover, GATT is today and was when Congress was considering the Trade Expansion Act the cornerstone of this country's international trade policy. At the time the Trade Expansion Act was passed, the United States had mutual trade obligations with fifty countries under the GATT, but only eight bilateral trade agreements. See U.S. Tariff Commission, *Operation of Trade Agreements Program*, 16th Report, July 1963–June 1964, pp. 63–64 (1965).

Congress was informed, during hearings on the Act, that the United States intended to use the GATT as the primary mechanism for tariff negotiations under the proposed Act. See House Ways and Means Committee, Hearings on H.R. 9900, 87th Cong., 2d Sess., pp. 3864–3865 (statement by Under Secretary of State Ball); and Senate Finance Committee, Hearings on H.R. 11970, 87th Cong., 2d Sess., pp. 65–67 (statement by Secretary of Commerce Hodges), pp. 2172–2181 (statement by Secretary of Agriculture Freeman); 108 Cong. Rec. 19873 (remarks of Senator McCarthy).

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[7] Several state courts have held that GATT is a treaty in the constitutional sense. *E.g.*, *Territory of Hawaii* v. *Ho*, 41 Hawaii 365, 367–368; *Baldwin-Lima-Hamilton Corp.* v. *Superior Court*, 25 Cal. Rptr. 798, 809 (D. Ct. App.). The Court of Customs and Patent Appeals has concluded that the GATT created an "international obligation" under Section 289(a)(1) of the Internal Revenue Code of 1939. *Bercut-Vandercook & Co.* v. *United States*, 46 CCPA 28, 31.

Congress did not intend that the President, in acting under Section 252(c), consider all our international obligations except the chief agreement governing this country's international trade.[8]

3. Petitioner also contends that the proclamation is invalid under the due process clause of the Fifth Amendment because the notice of public hearing (Pet. App. 38a–41a) issued pursuant to Section 252(d) of the Act failed adequately to inform interested parties of the action to be taken (Pet. 15–17). This issue is not properly before the Court.

Before the Customs Court petitioner stipulated (Pet. App. 34a):

> Plaintiff does not raise any issue in respect to the compliance with the procedural requirements of Section 252(d) of said act in providing an opportunity for the presentation of views concerning foreign import restrictions referred to in Section 252(c) * * *.

This stipulation included the adequacy of the notice. It is section 252(d) which provides for giving "an opportunity for the presentation of views concerning foreign import restrictions" and also for

[8] The decision below does not conflict with *The Five Per Cent. Discount Cases*, 243 U.S. 97. There this Court agreed with the Government's contention that a statute providing for a tariff discount on goods shipped in American vessels, where this did not impair treaty provisions, could not be construed to give the same benefit to goods carried in non-American bottoms from countries with which we had reciprocal trade agreements. The court there held that the construction advocated by the importers would be inconsistent with "the purpose to favor American shipping [which] was the manifest inducement for putting the subsection in." 243 U.S. at 107. No such inconsistency is present here.

"public hearings" to be held "after reasonable notice." 19 U.S.C. 1882(d).[7] The giving of adequate notice is one of "the procedural requirements of Section 252(d)" within the stipulation.

B. *The Proclamation is valid under Section 350(a)(6).*

The judgment of the Court of Customs and Patent Appeals may also be sustained upon the alternative ground, which that court did not reach, that the proclamation was justified under Section 350(a)(6) of the Tariff Act of 1930.

The parties stipulated that the statutory duty on brandy had been reduced "by various trade agreements [*i.e.* proclamations] proclaimed under the authority of Section 350 of the Tariff Act of 1930" (Pet. App. 33a). Section 350(a)(6) provides that "The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section." Proclamation 3564 expressly stated that the President acted under that section (Pet. App. 36a).

The Customs Court agreed that Section 350(a)(6) authorized the President's action (Pet. 11a). But the court held that because the President also relied on Section 252(c), he was precluded from exercising the authority granted him by Section 350(a)(6) without the limitations which the court found inherent in Section 252(c). In particular, the court pointed to the fact that the rates which went into effect were set forth in the proclamation and in Part 2B of the Appendix of the Tariff Schedule (Pet. App. 11a).

[7] The rates set forth in the proclamation were the statutory rates which go into effect automatically upon termination of trade agreement rates. See footnote 2, *supra*.

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This reasoning will not withstand analysis. If, as the Customs Court correctly pointed out, the President has the power to terminate previously proclaimed reductions by proclamation, this power is not lost because the President additionally includes the rates which will go into effect after the previous reduction is removed in the proclamation and in the Appendix to the Tariff Schedules. *United States* v. *Metropolitan Petroleum Corp., supra,* 42 CCPA 38, 43, 47. The Court of Customs and Patent Appeals has consistently construed Section 350(a)(6) as authorizing the President to terminate presidentially proclaimed reductions irrespective of other provisions giving less extensive powers in other situations. *E.g., United States* v. *American Bitumuls & Asphalt Co.,* 44 CCPA 199, certiorari denied, 355 U.S. 883; *George E. Bardwil & Sons* v. *United States,* 42 CCPA 118; *United States* v. *Metropolitan Petroleum Corp., supra;* cf. *Barclay & Company, Inc.,* 41 Cust. Ct. 135, affirmed, 47 CCPA 133; *United States* v. *Schmidt Pritchard & Co.,* 47 CCPA 152, certiorari denied, 364 U.S. 919.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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